Joseph Lee Hen Shenn v Shearn Delamore & Co and Drew and Napier

HIGH COURT (KOTA KINABALU) — BANKRUPTCY NOTICE NO K29–547 OF 2009
ABDUL RAHMAN SEBLI J
28 MARCH 2012

Bankruptcy — Creditor's petition — Presentation of — Petition presented five months after date of act of bankruptcy — Whether petition null and void — Whether petition should have been presented after expiry of six months from date of act of bankruptcy — Section 5(1)(c) of the Bankruptcy Act 1967 — Whether debtor's failure to comply with r 117 of the Bankruptcy Rules 1969 in applying to strike out petition fatal or curable — Bankruptcy Act 1967 s 5(1)(c)

The judgment debtor ('debtor') applied to strike out the judgment creditor's ('creditor') bankruptcy petition on the ground it was null and void in that it was presented before the expiry of six months from the date of the alleged act of bankruptcy. Under s 5(1)(c) of the Bankruptcy Act 1967 ('the Act'), a creditor was not entitled to present a bankruptcy petition against a debtor unless the act of bankruptcy on which the petition was grounded had occurred within six months before the presentation of the petition. The debtor argued that as his act of bankruptcy was allegedly committed on 12 December 2009, the creditor had to wait until after the expiry of six months from that date before the petition could be presented. The petition was in fact presented on 24 May 2010. In opposing the debtor's application, the creditor also raised the ground of res judicata arguing that the s 5(1)(c) issue should have been raised during the debtor's earlier attempt to set aside the petition. The creditor also submitted that the debtor had fatally breached r 117 of the Bankruptcy Rules 1969 which required a notice of intention to show cause against the petition to be filed and served at least three days before the hearing of the petition. The debtor appealed to the judge in chambers against the senior assistant registrar's dismissal of his application.

Held, dismissing the appeal with costs:

(1) Although s 5(1)(c) of the Act did not expressly say the petition must be presented within six months from the date of the act of bankruptcy, the fact that a six-month cut-off period was stipulated meant the petition must be presented within six months from that date and not six months thereafter (see para 5).

(2) For the breach of r 117 alone, the debtor's application ought to be

dismissed. The failure to file a notice under r 117 could not be treated as a formal defect or an irregularity which could be cured (see para 13).

(3) The debtor's application also failed on the ground of res judicata (see para 7).

[Bahasa Malaysia summary

Penghutang penghakiman ('penghutang') memohon untuk membatalkan petisyen kebankrapan pemiutang penghakiman ('pemiutang') atas alasan ia adalah terbatal dan tak sah di mana ia dikemukakan sebelum tamat enam bulan dari tarikh tindakan kebankrapan yang didakwa tersebut. Di bawah s 5(1)(c) Akta Kebankrapan 1967 ('Akta'), pemiutang tidak berhak untuk mengemukakan petisyen kebankrapan terhadap penghutang kecuali tindakan kebankrapan atas mana petisyen tersebut didasarkan berlaku dalam masa enam bulan sebelum pengemukaan petisyen tersebut. Penghutang berhujah bahawa memandangkan tindakan kebankrapannya didakwa dilakukan pada 12 Disember 2009, pemiutang terpaksa menunggu sehingga selepas tarikh tamat enam bulan dari tarikh tersebut sebelum petisyen dapat dikemukakan. Petisyen sebenarnya dikemukakan pada on 24 Mei 2010. Dalam menentang permohonan penghutang, pemiutang juga membangkitkan alasan res judicata dengan berhujah bahawa isu s 5(1)(c) patut dibangkitkan semasa percubaan sebelumnya oleh penghutang untuk mengenepikan petisyen tersebut. Pemiutang juga berhujah bahawa penghutang telah secara serius memungkiri kaedah 117 Kaedah-Kaedah Kebankrapan 1969 yang mengkehendaki notis niat untuk menunjukkan kausa terhadap petisyen untuk difailkan dan diserahkan sekurang-kurangnya tiga hari sebelum pendengaran petisyen tersebut. Penghutang merayu kepada hakim dalam kamar terhadap penolakan permohonannya oleh timbalan kanan pendaftar.

Diputuskan, menolak rayuan dengan kos:

(1) Walaupun s 5(1)(c) Akta tidak secara nyata menyatakan petisyen tersebut mesti dikemukakan dalam masa enam bulan dari tarikh tindakan kebankarapan, fakta bahawa tempoh pemotongan enam bulan ditetapkan bermaksud petisyen mesti dikemukakan dalam masa enam bulan dari tarikh tersebut dan bukan enam bulan selepasnya (lihat perenggan 5).

(2) Untuk kemungkiran kaedah 117 semata-mata, permohonan penghutang patut ditolak. Kegagalan untuk memfailkan notis di bawah kaedah 117 tidak boleh dianggap sebagai kecacatan formal atau ketaksekataan yang boleh diperbaiki (lihat perenggan 13).

(3) Permohonan penghutang juga gagal atas alasan res judicata (lihat perenggan 7).]

Notes

For cases on dismissal, see 1(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2797–2799.

Cases referred to

Brisbane City Council v Attorney-General for Queensland [1979] AC 411, PC (refd)

Dato' Fathi bin Hj Ahmad v Standard Chartered Bank Malaysia Bhd [2006] 2 MLJ 454, CA (refd)

Development & Commercial Bank Bhd v Datuk Ong Kian Seng [1995] 2 MLJ 724, FC (refd)

Government of Malaysia v Dato' Chong Kok Lim [1973] 2 MLJ 74 (refd)

Henderson v Henderson (1843) 67 ER 313, HC (refd)

Kewangan Utama Bhd v Muhibah bt Hj Ali [2008] MLJU 954, HC (refd)

Lee Guan Pan; ex p Hotel Universal Sdn Bhd, Re [2009] 7 MLJ 427, HC (refd)

Ostime v Australian Mutual Provident Society [1960] AC 459, HL (refd)

Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee [2004] 3 MLJ 253, FC (refd)

Satyadhyan Ghosel and Others v C Sint Deorajin Dobi and Another AIR 1960 SC 941 (refd)

Superintendent of Pudu Prison & Ors v Sim Kie Chon [1986] 1 MLJ 494, SC (refd)

Tan Ah Tong v Dato' Seri Dr Kuljit Singh [2002] 6 MLJ 39, HC (refd)

Wong Kin Nyuk Ex Parte Alliance Bank Malaysia Bhd, Re [2011] 1 LNS 786, HC (refd)

Yat Tung Investment Co Ltd v Dao Heng Bank Ltd [1975] AC 581, PC (refd)

Legislation referred to

Bankruptcy Act 1967 s 5(1)(c)
Bankruptcy Rules 1969 r 117

Tiong Jia Yi (Baldev Gan & Associates) for the judgment creditor.
Cecil Ian Robertson (C Robertson) for the judgment debtor.

Abdul Rahman Sebli J:

[1] By summons in chambers dated 25 October 2011 the judgment debtor applied for an order that the judgment creditor's petition be struck out on the ground that the petition is null and void in that it was presented before the expiry of the six months period measured from the date of the alleged act of bankruptcy. The application was heard and dismissed by the senior assistant registrar on 16 December 2011. Hence this appeal to the judge in chambers.

[2] The judgment debtor's argument is premised on s 5(1)(c) of the Bankruptcy Act 1967 ('the Bankruptcy Act') which provides as follows:

> (1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless:
>
> (c) the act of bankruptcy on which the petition is grounded has occurred within six months before the presentation of the petition.

[3] The act of bankruptcy was allegedly committed on 12 December 2009 and the petition was presented on 24 May 2010. It was contended that the judgment creditor must wait until after the expiry of the six months period before the petition could be presented. Reliance was placed on my judgment in *Re Wong Kin Nyuk Ex Parte Alliance Bank Malaysia Bhd* [2011] 1 LNS 786 where I held, inter alia, that the earliest date a bankruptcy petition can be presented is six months after the alleged act of bankruptcy. This is what I said in that case:

> In my view the effect of s 5(1)(c) of the Act is to allow a moratorium of six months before the creditor's petition can be presented, which means the earliest date the petition can be presented is the day after the expiry of the six months period. It makes no sense to argue that the petition must be presented within six months from the date of the act of bankruptcy because to present the petition at any point of time within that period would be to go against the prohibition imposed by s 5(1)(c) itself.

[4] I have since had the benefit of reading the judgments in the following cases: *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253 (FC); *Dato' Fathi bin Hj Ahmad v Standard Chartered Bank Malaysia Bhd* [2006] 2 MLJ 454 (CA); *Tan Ah Tong v Dato' Seri Dr Kuljit Singh* [2002] 6 MLJ 39; *Re Lee Guan Pan ex p Hotel Universal Sdn Bhd* [2009] 7 MLJ 427; *Kewangan Utama Bhd v Muhibah bt Hj Ali* [2008] MLJU 954.

[5] Admittedly the judicial pronouncements in these cases are obiter dicta but they are nevertheless illuminating enough in my view to lay bare the fallacy of my reasoning in *Re Wong Kin Nyuk* or at the very least to warrant a re-look at the issue. Although s 5(1)(c) of the Bankruptcy Act does not expressly say that the petition must be presented within six months from the date of the act of bankruptcy the fact that a six month cut off period is stipulated means that the petition must be presented within six months from that date and not six months thereafter. To give the construction that I gave in *Re Wong Kin Nyuk* would I must now admit lead to an absurdity and will not be consistent with the legislative scheme of the Bankruptcy Act.

[6] I find solace in the fact that I am not bound to follow my judgment in *Re Wong Kin Nyuk* and I do now depart from what I have decided in that case.

Lord Denning had the following words of advise in *Ostime v Australian Mutual Provident Society* [1960] AC 459 at p 489:

> The doctrine of precedent does not compel your lordships to follow the wrong path until you fall over the edge of the cliff. As soon as you find that you are going in the wrong direction, you must at least be permitted to strike off in the right direction, even if you are not allowed to retrace your steps.

[7] The striking out application was also opposed by the judgment creditor on the ground of res judicata. It was argued that the issue of s 5(1)(c) of the Bankruptcy Act should have been raised at the time the judgment debtor first attempted to set aside the creditor's petition and not now. I am inclined to agree with the judgment creditor. The doctrine of res judicata has its origin in the judgment of Wigram VC in *Henderson v Henderson* (1843) 67 ER 313 where the learned judge laid down the following rule at p 319:

> Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

[8] Closer to shore Sharma J in dealing with the issue of res judicata in *Government of Malaysia v Dato' Chong Kok Lim* [1973] 2 MLJ 74 cited the Indian case of *Satyadhyan Ghosel and Others v C Sint Deorajin Dobi and Another* AIR 1960 SC 941where the following observations were made:

> The principle of res judicata is based on the need to giving a finality to judicial decisions … The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.

[9] The learned judge went on to hold that res judicata is also applicable to issues which were not made issues but which ought to have been made issues. This is how the learned judge expressed his view at p 76:

> The rule is that a matter which might and ought to have been made a ground of attack or defence becomes a matter which was constructively in issue. A matter which might and ought to have been made a ground of attack or defence is for the

purposes of the plea of res judicata deemed to have been a matter directly and substantially in issue in the former application, that is to say, though it may not have been directly and substantially in issue it is still regarded as, having been constructively, directly and substantially in issue. There can be no distinction between a claim that was actually made and a claim which might and ought to have been made. The plea of res judicata applies, except in special cases …It is only where the plea which is sought to be raised in the subsequent proceedings was not available to the party at the time of the previous proceedings that the decision cannot be constructively res judicata. The rule of constructive res judicata is really a rule of estoppel.

[10] In *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494 Abdoolcader SCJ delivering the judgment of the Supreme Court said at p 498:

> The appellants plead res judicata in this regard and we think the point is well taken and is supported by authority, and we would refer to the pronouncement of the *Privy Council in Hoystead & Ors v Commissioner of Taxation* and a catenation of cases to the like effect, namely, that the plea of res judicata applies, except perhaps where special circumstances may conceivably arise of sufficient merit to exclude its operation, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

[11] Further down in the same judgment the learned judge cited the judgment of Lord Wilberforce in *Brisbane City Council v Attorney-General for Queensland* [1979] AC 411 where the following passage in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 was quoted with approval:

> … there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.

[12] The other ground of opposition raised by the judgment creditor is that the judgment debtor failed to file in court and serve on the judgment creditor the show cause notice at least three days before the hearing of the petition. This is a clear breach of the Bankruptcy Rules 1969 ('the Rules'). On this ground alone the judgment debtor's application ought to be dismissed. The proper manner the creditor's petition should be opposed is set out in r 117 of the Rules which stipulates as follows:

> Where a debtor intends to show cause against a petition he shall file a notice with the Registrar specifying the statements in the petition which he intends to deny or dispute and transmit by post or otherwise to the petitioning creditor and his solicitor if known a copy of the notice three days before the day on which the petition is to be heard.

[13] It has been held by the Federal Court in *Development & Commercial Bank Bhd v Datuk Ong Kian Seng* [1995] 2 MLJ 724 that failure to file a notice under r 117 cannot be treated as a formal defect or an irregularity that can be cured.

[14] For reasons aforesaid the judgment debtor's appeal was dismissed with costs.

Appeal dismissed with costs.

Reported by Ashok Kumar